IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

NOTICE OF MOTION NO.3259 OF 2003
IN
APPEAL NO.28 OF 2003
IN
SUIT NO.1551 OF 1979

Rajmal Motilal Jhaveri & ors. Appellants
vs.
Gunmala Ghendmal Jhaveri & ors. Respondents

Mr.Suneep Sen i/b. Mr.Vivek Sharma for the appellants.

Mr.H.J.Thakkar, senior counsel with Mr.Akram i/b.
M/s.Hiralal Thakkar & Co. for respondents 1 and 2.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 28th October 2004

P.C.

This notice of motion is by the respondents 1 and 2. We heard the learned senior counsel for the respondents 1 and 2 (original plaintiffs) and the learned counsel for the appellants (original defendants 2 to 4).

2. The respondents 1 and 2 who are plaintiffs in their suit claimed the following reliefs:

(a) It be declared that the original plaintiff and/or plaintiffs no. 1(a) to 1(c) we entitled to a one-third share, right, title as interest in respect of the said chowpatty property described in Ex.'B' hereto.

(b) That the said property more particularly

described in the Exhibit 'B' hereto be ordered to be partitioned by metes and bounds and the original plaintiff and/or plaintiffs no. 1(a) to 1(c) be put in separate possession of his and/or their one-third share;

(c) That for the purpose aforesaid all necessary inquiries be made and direction given by this Hon'ble Court including appointment of a commissioner for effecting partition.

(d) That the defendants by themselves their servants and agents be restrained by a perpetual order and injunction of this Hon'ble Court from:

(i) dealing with or disposing off encumbering or alienating or parting with possession in any manner, the said chowpatty property situate at 10, Chowpatty, Sea Face, described Exhibit 'B' hereto.

(ii) creating any right in respect of the premises on the ground floor in the said building or granting any premises or consent to carry out any work in the ground floor premises.

(iii) Dealing with a disposing off the open chowk in the said building or creating any right in respect of the said building or any part thereof and/or the terrace thereof.

(e) That pending the hearing and final disposal of the suit the Court Receiver or some other fit and proper person be appointed as Receiver of the said Chowpatty property described in Exhibit 'B' hereto.

(f) That pending the hearing and final disposal of the suit the defendants be themselves their servants and agents be restrained by an order and injunction of this Hon'ble Court in terms or the perpetual injunction prayed for above.

(g) That for the purpose aforesaid all enquiries be made and accounts taken in

respect of rents and profits recovered by defendants 1 to 4 and 5 and 6.

(h) That the original plaintiff and/or plaintiffs no.1(a) to 1(c) be granted such further and other reliefs and orders as the nature and circumstances of the case may require."

3. By its judgment and decree dated 16th July 2002/ 24th July 2002, the learned trial Judge decreed the plaintiffs suit thus:

"62. The suit is decreed in favour of the plaintiffs in terms of prayer clauses (a), (b) and (d). In terms of prayer clauses (c) and (g), the Commissioner for taking Accounts is appointed to take such steps as are required for effecting partition as also in terms of prayer clause (g). The suit is decreed in terms of prayer clauses (a), (b) and (d). The Commissioner for taking Accounts is appointed in terms of prayer clauses (c) and (g). Upon the Commissioner for taking Accounts determining the rights of the parties, there will be a decree in terms of prayer clause (b). After the Commissioner for taking Accounts submits his report, the matter be placed before the Court for the purpose of pronouncing decree in terms of prayer clauses (b) and (g). The Commissioner for taking Accounts to submit his report within a period of six months."

4. The original defendants 2 to 4 have preferred the appeal. The appeal has been admitted and by the interim order dated 28th March 2003 the Division Bench passed the following order:

" In order dated 7th February 2002, para 2 of the order be substituted by the following:

'Commissioner for taking accounts may

take steps to effect partition and take accounts as per the decree of the trial Court and submit his report to this Court. However, no further order be passed on the Commissioner's report till disposal of the appeal.'

Parties to act on an ordinary copy of this order duly authenticated as true copy by; the Associate of this court. "

5. Pursuant to the aforesaid interim order dated 28th March 2003, the Commissioner for taking Accounts has submitted his report dated 30th August 2004.

6. By this notice of motion taken out by the respondents 1 and 2 (original plaintiffs) in the month of November 2003 it is prayed that the Court Receiver, High Court, Bombay be appointed as Receiver of the suit property with all powers under Order 40, Rule 1 of the Code of Civil Procedure. It is also prayed that the appellants (original defendants 2 to 4) be directed to deposit with the Prothonotary and Senior Master of this Court a sum of Rs.10,65,532/- or such other amount as this Court may deem fit and proper being one third share of the plaintiffs. This is based on the income said to have been derived and received by the appellants from M/s.Selvel Publicity and Consultants Pvt.Ltd. in respect of the Neon Sign Hoarding since 01.04.1983 to 31.08.2003. It is also prayed that the respondents 1 and 2 be directed to deposit with the Prothonotary and Senior Master of this Court one third of such amount

received by them as premium/deposit from M/s.NBS International Pvt.Ltd. and/or Ibrahim Jusaf in respect of the commercial premises given on lease/tenancy basis to them.

7. It is not disputed before us by the learned senior counsel appearing for the plaintiffs that the plaintiffs have given up their right of partition of the subject immovable property by metes and bounds as it was not possible and the plaintiffs undivided one third share in the subject immovable property shall have to be determined under the Partition Act. In that event we hardly find any justification for appointment of the Court Receiver over the subject property. particularly in a situation where the appellants have already been injuncted from creating any third party right or interest or encumbrance in the subject property. Thus, prayer (a) of the notice of motion does not deserve to be granted.

8. As regards prayers (b) and (c) made in the notice of motion, we are of the view that now since the Commissioner for taking Accounts has submitted the report and as per judgment and decree dated 16th July 2002/24th July 2002, the learned trial Judge is to pass the appropriate order on the report of Commissioner for taking Accounts, prayers (b) and (c) may be considered

by the learned trial Judge while passing the order on the report of Commissioner for taking Accounts.

9. We, accordingly, dispose of this notice of motion by the following order:

(i) Prayer (a) of the notice of motion is rejected.

(ii) The interim order passed on 28th March 2003 is discharged. The report submitted by the Commissioner for taking Accounts dated 30th August 2004 is ordered to be placed before the learned trial Judge taking up such matters for passing appropriate order on the said report as per the impugned judgment and decree dated 16th July 2002/24th July 2002.

(iii) The plaintiffs shall be at liberty to press for appropriate order in terms of prayers (b) and (c) made in the present notice of motion before the learned trial Judge as and when the report dated 30th August 2004 comes up for consideration.

(iv) The appellants, if aggrieved by the order

passed by the learned trial Judge on the report dated 30th August 2004 submitted by the Commissioner for taking Accounts, shall be at liberty to challenge the same in appropriate proceeding.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)